

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WINDER McAFEE,

Defendant-Appellant.

UNPUBLISHED

July 30, 2002

No. 231257

Wayne Circuit Court

LC No. 98-012855

Before: Murray, P.J., and Sawyer and Zahra, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of possession of more than 25 but less than 50 grams of cocaine, MCL 333.7403(2)(a)(iv). The trial court sentenced him as a fourth felony offender, MCL 769.12, to 2 to 15 years' imprisonment, with credit for 361 days served. Defendant appeals as of right. We affirm.

Defendant's sole claim on appeal is that his sentence was disproportionately harsh. This Court reviews sentences imposed on habitual offenders for an abuse of discretion. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). The judicial sentencing guidelines do not apply to defendant because he was sentenced as an habitual offender, *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997), and may not be considered by this Court in reviewing the sentence, *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Nevertheless, his sentence must be proportionate to the seriousness of the crime and his prior record. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). When an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *Id.* at 599.

As a fourth felony offender convicted of an underlying felony punishable by a maximum term of four years, under MCL 769.12(1)(b) defendant could receive a maximum sentence of no more than fifteen years. His sentence was within that statutory limit. Further, it is apparent that defendant is unable to conform his conduct to the law. Defendant's criminal history began with a 1976 willful killing conviction, followed by a controlled substances conviction in 1990, and a CCW conviction in 1994. As the trial court emphasized, the circumstances surrounding the offense were such that it was reasonable to conclude that defendant was either selling or allowing sales of drugs out of his house. A sentencing court may consider the facts underlying acquittals, as long as the facts are supported by reliable evidence. *People v Lawrence*, 206 Mich

App 378, 379; 522 NW2d 654 (1994). Under these circumstances, defendant's two-year minimum sentence was not an abuse of discretion.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Brian K. Zahra